

to review any denial of an order under FISA. These courts are made up of Federal judges from around the country, and they meet in secret session here in Washington, D.C.

I would note that the House Permanent Select Committee on Intelligence report that accompanied FISA in 1978 clearly expressed Congress' intent to exclude from coverage overseas intelligence activities. In other words, they never intended for the FISA court and procedure to somehow have authority over what is truly overseas intelligence activities dealing with foreign intelligence or intelligence of foreign governments or foreign organizations.

The report stated this: "The Committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas intelligence." In other words, it was not the focus of the 1978 act, rather, the act focused on domestic surveillance of persons located within the United States. The law was crafted specifically to exclude surveillance operations against targets outside the U.S., including those circumstances where the targets were in communication with Americans, as long as the U.S. side of the communication was not the real target. That's a very important thing to understand.

In the ability to be able to record these messages or in some way pick up these communications, you really have the ability to target one side of the communication. And so what we do is we target a foreign person in a foreign country.

Contrary to what Congress originally intended, due to the changes in technology and resulting interpretation of the FISA Act, warrants have been recently required in order to conduct surveillance against terrorists located overseas in some circumstances. Why? The technology changed in that, in 1978, most local communication was by wire, most international communication was wireless by satellite. We could take it basically out of the air, for want of a better description, and it was overseas. The 1978 act did not contemplate bringing those conversations, those communications within the ambit of FISA.

In the intervening years, we've had a revolution in technology by which most local communication now is by wireless and international communication basically comes by wire. And the fact of the matter is the nodes or the centers or the switching places, whatever you want to call it, not technical terms, happen to be, most of them, in the United States. And so suddenly the interpretation of FISA, now looking at the connection where you would try and somehow be able to capture this conversation that really was of someone overseas and not American, now, because it transited somehow the U.S., an interpretation by the FISA court was that a warrant was now needed.

Now, why would this present a problem for our intelligence community? Admiral McConnell, the former head of the National Security Agency, NSA, under President Clinton and now the current Director of National Intelligence, explained this to our Judiciary Committee. It takes about 200 man-hours to prepare a request for a court order in the FISA court for just one telephone number; 200 man-hours. As he explained to the judiciary in the other body, intelligence community agencies were required to make a showing of probable cause in order to target for surveillance the communications of a foreign intelligence target located overseas; then, they need to explain the probable cause finding in documentation and obtain approval of the FISA court to collect against a foreign terrorist located in a foreign country.

Frequently, although not always, that person's communications were with another foreign person located overseas. In such cases, prior to the Protect America Act, that's the act that we passed before we left in August, which I might add is not going to be allowed to be considered on the floor, at least the Rules Committee told us earlier today they would allow no amendments, the FISA's requirement to obtain a court order based on a showing of probable cause slowed, and in some cases, prevented altogether the government's ability to collect foreign intelligence information out serving any substantial privacy or civil liberties interests.

Again, as the legislative history of the 1978 FISA Act made clear, it was never the intention of the act to cover surveillance of non-U.S. persons overseas so long as the U.S. person located in the United States was not the real target of the surveillance. Yet prior to the enactment of the bill that we passed in August, which has a sunset in February of next year, that's the reason we have to consider it this week, our intelligence community was saddled with the requirement that they devote substantial resources for the preparation of applications required to be submitted to the FISA court.

□ 2015

As an economist might say, this substantial diversion of resources imposed opportunity costs measured in terms of the intelligence analysis which was not done because of the need to complete paperwork in order to surveil foreign intelligence assets outside the U.S. who were never intended to be covered by the old law. In other words, you had to take the analysts off the job of looking at current communications that might protect us against attacks in the United States or elsewhere by those who want to kill Americans, who have said, by the way, that they would be justified in killing 4 million Americans, 2 million of whom would be women and children. We take them off that pursuit and instead put them on this job of doing the intellectual work

that would allow for the paperwork to be presented to the FISA Court.

Furthermore, in response to a question I posed to him, Admiral McConnell affirmed that prior to the Protect America Act, again, the act we passed just before we left in August, the intelligence community attempted to work under the laws interpreted by the court but found that as a result of working under those restrictions, his agency was prohibited from successfully targeting foreign conversations that otherwise would have been targeted for possible terrorist activity. Think of that: those kinds of conversations that we always were able to pick up before, before we ever had a FISA, after we had the 1978 FISA Act, we were not able to pick up anymore.

In fact, he said that prior to the enactment of the Protect America Act this past August, we were not collecting somewhere between one-half and two-thirds of the foreign intelligence information which would have been collected were it not for the recent legal interpretations of FISA requiring the government to obtain FISA warrants for overseas surveillance. To put it in graphic terms, we have put blinders on one of our two eyes as to the ability for us to look at those dots and connect those dots that the 9/11 Commission said we weren't finding and weren't connecting before 9/11.

The consequences of this for our Nation's security are very real. As Admiral McConnell explained to our committee: "In the debate over the summer and since, I heard from individuals from both inside and outside the government assert that threats to our Nation do not justify this authority. Indeed, I have been accused of exaggerating the threats that face our Nation," said Admiral McConnell.

He continued: "Allow me to attempt to dispel this notion. The threats that we face are real and they are indeed serious. In July of this year, we released a National Intelligence Estimate, commonly referred to as an NIE, on the terrorist threat to the homeland. In short, these assessments conclude the following: the United States will face a persistent and evolving terrorist threat over the next 3 years." Why 3 years? That is the total time of the NIE. They are not saying it will only just be 3 years, but in the time frame that they were supposed to assess, this threat will continue.

They say that the main threat comes from Islamic terrorist groups and cells, especially al Qaeda. Al Qaeda continues to coordinate with regional terrorist groups such as al Qaeda in Iraq, across North Africa and other regions.

Al Qaeda will likely continue to focus on prominent political, economic, and infrastructure targets with a goal of producing mass casualties. Mass casualties. That means thousands, if not millions, of Americans if they were successful. Visually dramatic destruction, significant economic aftershock and fear among the